Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

Deborah Quick Scales,

Petitioner,

v.

The George Washington University,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

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QUESTIONS PRESENTED

I. CONSTITUTIONAL QUESTION

Whether the Petitioner's right to trial by jury preserved by the Seventh Amendment to the Federal Constitution has been infringed upon and whether the judgment of the court below conflicts with the unanimous decision of this Court in Lytle v. Household Manuf. cturing, Inc., 494 U.S. 545 (March 20, 1990) where the district court first resolved the Petitioner's equitable claims under Title VII solely because it erroneously and summarily dismissed Petitioner's legal claims under 42 U.S.C. Section 1981 along with her common law claims of breach of contract, fraud and intentional infliction of emotional distress.

II. STATUTORY QUESTION

Whether the court below sanctioned a violation of 28 U.S.C. Section 455(a) by the district judge and whether the district judge's impartiality might reasonably be questioned under the tenets of this Court's ruling in

Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988), where:

[a] during the pendency of the case before him, the judge formed and maintained a patient-Hospital, doctor-patient relationship with the Respondent's Hospital - Petitioner's employer of over 21 years whose employment practices the Petitioner is challenging;

[b] the judge failed to disclose to Petitioner said relationship for over a period of three years while erroneously dismissing most of her claims; and

[c] finally disclosed his relationship to Petitioner but refused to recuse himself while disqualifying prospective jurors for an advisory panel for having past or present patient-Hospital relationship with the Respondent (the same or lesser reason than he had to disqualify himself.)

III. PROCEDURAL QUESTION

Whether in a Rule 52(c), Federal Rules of Civil Procedure, judgment rendered against the Petitioner at the close of her case-in-chief, a trial court may rely upon the testimony of defendant's witnesses allowed to testify out-of-turn ostensibly to facilitate scheduling conflicts and with the court's assurance that such testimony will be excluded for purposes of a Rule 52(c) motion.

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceedings below are those whose names appear in the caption of the case.

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OPINIONS BELOW

The judgment of the United States Court of Appeals for the District of Columbia Circuit is unpublished and is set out in the Appendix to this Petition at pages 1 - 2. The order of court of appeals denying the Petition for Rehearing and Suggestion for Rehearing en banc are unpublished and proffered herewith at pages 3 and 4 of the Appendix. The order of the court of appeals denying Petitioner's Motion for Summary Reversal is also unpublished. It appears at page 5 of the Appendix.

The district court's four summary judgments dismissing all of Petitioner's legal claims and a portion of her Title VII claims are unreported and appear as follows in the Appendix in the order of their issuance:

Order and Memorandum filed March 25, 1991 at pages 6 through 25 of the Appendix;

Order and Memorandum filed November 18, 1991 at pages 26 through 46 of the Appendix;

Order and Memorandum filed August 21, 1992 at pages 47 through 59 of the Appendix;

Order and Memorandum filed February 9, 1993 at pages 60 through 69 of the Appendix.

Finally, the district judge's bench opinion, filed July 27, 1993, is proffered at pages 70 through 122 of the Appendix.

JURISDICTION

The judgment of the court of appeals was entered on November 28, 1994. A timely Petition for Rehearing before the panel and a Suggestion for Rehearing en banc were denied on January 17, 1995 [Appendix pp. 2-4]. This Petition is timely filed and the jurisdiction of this Court is properly invoked under 28 U.S.C. Sec. 1254(1) cum RULES 13.4, 10.1(c) and 10.1(a) of the Rules of the Supreme Court.

VERBATIM TEXT OF THE CONSTITUTIONAL, STATUTORY AND PROCEDURAL PROVISIONS AT ISSUE

1. Text of the Seventh Amendment to the Constitution of the United States

"In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved and no fact tried by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

2. Text of the Pertinent Part of 28 U.S.C. Section 455

"Section 455. Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; "

3. Text of the Pertinent Part of Rule 52(c), Federal Rules of Civil Procedure

"(c) Judgment on Partial Findings: If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule."

4. Text of the Pertinent Part of Rule 38, Federal Rules of Civil Procedure

"(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefore in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(c) Same: Specification of Issues. In the demand a party may specify the issues which the party wishes to be tried; otherwise the party shall be deemed to have demanded trial by jury for all of the issues so triable. ...."

5. Text of the Pertinent Part of Rule 39, Federal Rules of Civil Procedure

"(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action,. The trial of all issues so demanded shall be by a jury, unless (1) the parties or their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered into the record, consent to trial by the court sitting without a jury or (2) the court upon motion of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States."

GLOSSARY

To facilitate review of the Petition is proffered to describe abbreviations, acronyms and other contracted references used:

This Court refers to The Supreme Court of the United States;

USCA, the court below, the circuit court, the appeals court (interchangeably) refer to The United States Court of Appeals for the District of Columbia Circuit;

USDC, the district court, the trial court (interchangeably) refer to the United States District Court for the District of Columbia;

the Hospital, defendant's Hospital, Respondent's Hospital (interchangeably) refer to The George Washington University Medical Center or Hospital;

the judge, the district judge refer to the Honorable Judge Louis F. Oberdorfer;

AA refers to affirmative action;

APX. refers to PETITIONER'S APPENDIX proffered with this Petition under separate cover;

ANC refers to Assistant Nurse Coordinator;

ANUC refers to Acting Nursing Unit Coordinator;

EEO refers to equal employment opportunity;

LPN refers to Licensed Practical Nurse;

NUC refers to Nursing Unit Coordinator;

PNC refers to Practical Nurse Certificate;

R/N refers to Registered Nurse;

SNI refers to Staff Nurse I;

SNII refers to Staff Nurse II;

PART ONE

CONCISE STATEMENT OF THE CASE AND OF THE FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

I. STATEMENT OF THE CASE

The Petitioner, Deborah Quick Scales, is an African-American. By profession, she is a nurse with a Practical Nurse Certificate, an Associate Degree in Nursing (1974), a B.S.N. (1979), and a M.S.N. (1991).

Scales (Petitioner) served the Respondent for over a period of 21 years (9/66 - 12/87). She was a Licensed Practical Nurse ("LPN") for 7.5 years, a Staff Nurse I ("SNI") for 2.00 years, a Staff Nurse II ("SNII") for 3.33 years, an Assistant Nurse Coordinator ("ANC") for 6.83 years, Acting Nursing Unit Coordinator ("ANUC") for 0.66 years, and again as ANC for 0.5 years. For more than fifteen of these years, she was a LPN, SNI, SNII, ANC, ANUC on a unit of the Hospital known as 5-South [*APX. p.291.*] Her performance had exceeded all of her employer's requirements.

In October 1986, the NUC position for 5-South became vacant. Scales formally applied for the position following her selection to fill the position as Acting NUC effective 11/02/86. This was her fifth effort for promotion to the NUC leadership position. She was also the *only internal candidate* for the job. This entitled her to be considered for the job *before* any outside candidate [*APX. pp.293; 267.*]. However, the Hospital scheduled an outside candidate, Joan Michaels (caucasian) and Scales for interviews. Michaels never formally applied for the NUC 5-South position although she was interviewed before Scales [*APX. p.307;308.*]

But the interview was a sham since *Michaels was preselected and offered the position prior to her scheduled interview*. She herself informed her interview panel that she has already been offered the position [*APX. p.199; 309.*] Nevertheless, Michaels' rejected the position by 12/15/86. The Hospital informed Scales that she was still a viable candidate and

proceeded to readvertise the position while retaining Scales as Acting NUC.

After several months of advertising, another caucasian, Ann Cooley (Pierpoint) from outside the defendant's institution applied for the job. By March 13, 1987, she was already interviewed and offered the position. However, *Scales was never reinterviwed for the job although many of Cooley's interviewers never interviewed Scales and those who previously interviewed her did not know that Scales was still in the running* [*APX. pp.204-5; 302.*]

Following her second rejection, Scales filed a charge of racial discrimination with the EEOC. She continued to serve in the "acting" NUC position while providing training and orientation to Cooley to assume the NUC leadership. Cooley took charge of the unit on 06/15/87 and Scales was demoted back to the ANC job. Following a series of adverse personnel actions (including a fraudulent performance appraisal), Scales filed a charge of retaliation

in November 1987. She separated on 12/08/87.

The Hospital maintains *separate lines of progression* - one for blacks and another for non-blacks. Hence, blacks are promoted from SNI to SNII, on average, in 2.6 years. The average for whites is 1.2 years. From SNII to ANC, the average for blacks is 2.0 years, for whites only 1.4. Whites spend an average of only 2.7 years as ANCs. Blacks expend 7.5 years. Whites need a mere 4.6 years for promotion from SNI through NUC positions. The average for blacks is 10.3 years [*APX. p.270.* See also *APX. pp.290-301.*]

The Hospital *segregates jobs on racial lines*. As described by the district judge, the Hospital's workforce structure is "WHITE TOP AND MINORITY (BLACK) BOTTOM." Blacks are excluded from the top and upper echelon management and leadership positions. In the middle echelon management and nursing professional positions, black representation is symbolic to nil. For instance, only 4 of the 73 NUCs recruited/ promoted by the Director of Nursing over a 16

year period are black. By contrast, blacks over-dominate the low-pay, low-skill and menial job categories in some of which they represent 100 percent of the workforce [*APX. 272-280.*] As reported by the Hospital's own consultants: "*there is an understructure of Black, underpaid workers ... [who have lost] pride [in themselves.] RACIAL SEPARATION ON THE BASIS OF JOBS IS EXTREMELY STRONG*." [*APX. p.312-313.*]

Against this background, Scales filed her instant civil action on March 27, 1989. Both the federal question and diversity jurisdictions of the court were properly invoked.

In COUNTS I & II of the Complaint, Scales asserted the defendant's violations of her Title VII protection against racial discrimination and retaliation. She also asserted parallel claims under Section 1981 (Counts III & IV).

In COUNT VI, Scales claimed the defendant breached her contractual protection against racial bias as third-party beneficiary to a contract between the Hospital and the Federal

Government. In COUNT VII, she asserted that the Hospital fraudulently represented itself as an EEO/AA employer verbally and in writing, when in fact, it was not. Scales detrimentally relied on the Hospital's misrepresentations resulting in her loss of career advancements and causing her to apply for promotion to the NUC position which she was denied twice.

Finally, in COUNT IX, she asserted that the Hospital's fraudulent conduct and/or intentional racial discrimination against her constitute the common law tort of intentional infliction of emotional distress ("emotional distress").

In her Complaint, Scales specifically *DEMANDED "JURY TRIAL ON ALL ISSUES TRIABLE BY RIGHT TO A JURY."*

II. FACTS MATERIAL TO THE CONSTITUTIONAL AND STATUTORY QUESTIONS

The district judge assigned to the case was the Honorable Judge Louis F. Oberdorfer ["the judge"]. He presided over the case throughout the proceedings in the district court. While

the case was still in the discovery phase, the judge was hospitalized for a serious and life-threatening heart condition between December 1989 and January 1990 at the defendant's Hospital. After an absence of some six months, the judge returned to the bench in May 1990. Although an on-going patient-Hospital (doctor-patient) relationship was established between the judge and the defendant, the relationship was not disclosed to the Petitioner for over a period of three years, i.e. until April 19, 1993 [the first day of the bench trial.]

Meantime, the judge engaged in extremely protracted summary judgment proceedings lasting nearly three years. He rendered four summary judgments - dated March 25, 1991; November 18, 1991; August 21, 1992 and February 9, 1993 - all against Scales. He singled out and summarily dismissed each cause of action which entitles Petitioner to trial by jury. Thus, in direct breach of Rule 56 of the Federal Rules of Civil Procedure as well as the standards for summary

judgment clearly established by this Court [please see PAGES 24-27, INFRA]:

1. The judge summarily dismissed Scales' Section 1981 claims although a contested genuine issue of material fact was unequivocally established by the record and even though a critical credibility issue was pending for jury determination (propounded below at pp. 27-31.);

2. The judge summarily dismissed Scales' common law claim sounding in fraud [count VII] erroneously and unlawfully misinterpreting and drawing inferences from the Petitioner's cultural adage -- "*you've got to work twice as hard as white folks in order to get ahead*" -- when, in fact, what the Petitioner believed or did not believe, what she thought or did not think, or what her state of mind was, were all issues properly left for jury determination as a matter of law [please see pp. 36-48, infra];

3. The judge summarily dismissed Petitioner's common law claim of intentional infliction of emotional distress [count IX] as

untimely when, as a matter of statutory law and by the contents of the judgment itself, the statute of limitation controlling the claim was three years and the claim was filed within sixteen months [please see pp. 49-52, infra.];

4. The judge summarily dismissed Scales' breach of contract claim without addressing her legal and factual claim that she is a third-party beneficiary to an EEO/AA contract between the Hospital and the Federal Government [enunciated below at pp. 31-35.]

III. FACTS MATERIAL TO THE STATUTORY QUESTION

After the effective elimination of the Petitioner's access to her constitutionally preserved jury rights, the judge allowed a portion of the Title VII claims to proceed to trial. On April 19, 1993, the bench trial commenced. At the behest of the judge, an advisory jury was impanelled.

During voir dire, the judge agreed to exclude from the panel all prospective jurors who either were patients at the Hospital or who

had a family member or friend hospitalized there. He directed: "*WE WILL HAVE TO ELIMINATE PEOPLE WHO HAVE BEEN PATIENTS THERE (AT THE GEORGE WASHINGTON UNIVERSITY)*" [*APX. p. 149*].

Several prospective jurors were excluded because the judge himself questioned their impartiality based on medical treatment they, their family member(s) or close friend(s) received from the Hospital [please see *APX. pp. 145-162*.] Even a juror who received outpatient treatment at the Hospital for five to six hours was disqualified because her impartiality was reasonably questioned [*APX. pp. 147-8*] Still others were excluded for maintaining health plans with the Hospital [*APX. pp. 155-6*.]

In the course of disqualifying jurors due to their Hospital-patient relationship with the defendant, the judge, for the first time, disclosed his own patient-Hospital relationship with the defendant. He stated, addressing Petitioner's counsel:

"*THAT BRINGS UP A QUESTION. I SHOULD HAVE*

TOLD YOU THIS BEFORE. BUT I WAS A PATIENT AT GW SOME THREE YEARS AGO. I DON'T KNOW WHETHER I BROUGHT THIS UP BEFORE, BUT IT SHOULD BE BROUGHT UP. I DON'T CONSIDER IT A DISQUALIFYING FACTOR. [UPON INTERRUPTING SCALES' COUNSEL, HE CONTINUED] DON'T SAY ANYTHING NOW. I AM NOT GOING TO RECUSE MYSELF. YOU MAY NEED THIS ON APPEAL. THE DECISION ABOUT WHETHER IT IS DISQUALIFYING IS MINE. YOU DON'T WAIVE ANY CLAIM ABOUT IT BUT I WANT YOU TO KNOW IT." [*APX. PAGES 149-150.*]

Thus, having chosen not to disqualify himself in breach of 28 U.S.C. Section 455(a), the judge impanelled an advisory jury which he dismissed by the third day of the 12-day bench trial proceedings.

IV. FACTS MATERIAL TO THE PROCEDURAL QUESTION

On April 22, 1993, as Petitioner's case-in-chief progressed, the defendant informed the court that both of its expert witnesses are scheduled to be out of town and would be unavailable to testify until May 5, 1993. To avert interruption of the trial because of this event, the court suggested, and Petitioner agreed, to have the defense experts testify out-of-turn during her case in chief.

But tangent to this decision, two extremely important developments took place:

FIRST, the judge made the following unsolicited remark indicating his intent to deny defendant's motion when proffered:

> "THE COURT: NOW, THAT WILL PERHAPS CLOUD YOUR ABILITY, THE DEFENDANT'S ABILITY TO MOVE AT THE COMPLETION OF PLAINTIFF'S CASE, BUT I THINK WE'D BETTER PUT THIS WHOLE -- PUT YOUR (defense counsel's) STORY ON THE RECORD TOO. *I PROBABLY WOULDN'T GRANT THAT MOTION ANYWAY* .... SO LET'S TAKE THOSE WITNESSES OUT OF TURN." [PLEASE SEE *APX. PAGE 170.*]

Detrimentally relying on this remark, Scales completely restrategized and restructured her case-in-chief. Key witnesses she planned to call on her case-in-chief were withheld for rebuttal. Likewise, substantial documentary evidence was reordered for use to discredit the defendant's witnesses during its case-in-chief. Even the questioning of hostile witnesses was refashioned to discredit them during their testimony for the defense.

SECOND, it was also clearly understood that the testimony of defendant's witnesses taken

out-of-turn would be *excluded* from the court's disposition of the defendant's Rule 52(c) motion at the close of Petitioner's case-in-chief. Unequivocally affirming this understanding, defendant's own counsel prefaced his motion:

> "MR. FRAZIER: LET ME JUST PREFACE MY REMARKS. *IN THE COURSE OF THE PROCEEDINGS UNTIL NOW WE DID HAVE TESTIMONY OF SEVERAL DEFENSE WITNESSES. YOUR HONOR HAS INDICATED THAT FOR THESE [i.e. the Rule 52(c)] PURPOSES HERE WE ARE NOT GOING TO CONSIDER THAT TESTIMONY* AND I'M NOT GOING TO ARGUE BASED UPON WHAT DR. SEBERHAGEN AND MS. CARL [i.e defendant's expert witnesses] HAD TO SAY REGARDING WHAT THEY DID OR REGARDING WHAT MS. McCARTHY [defendant's witness] HAD TO SAY ... ON MY DIRECT." [*APX. PAGE 171.*]

The remark made by the judge and the directives upon which defendant's witnesses were allowed to testify out-of-turn were discarded in the disposition of the Rule 52(c) motion. Hence, opposing the motion, Scales' counsel reminded the judge of the remark he made and of the understanding upon which Petitioner's case-in-chief was premised. But the judge denied the remark. To wit:

'MR. MEKBIB: GOOD MORNING, YOUR HONOR. AT

THE OUTSET, YOUR HONOR, I WOULD LIKE TO INDICATE THAT WHEN MR. FRAZIER BROUGHT FORTH HIS EXPERT WITNESSES TO TESTIFY OUT-OF-TURN, YOU INQUIRED THAT THE REASON WHY THOSE EXPERTS WOULD NOT BE ALLOWED TO TESTIFY OUT-OF-TURN WAS BECAUSE THAT WOULD DISRUPT THE DEFENDANT'S ABILITY TO BRING FORTH ITS CURRENT MOTION, AND YOU INDICATED AT THE TIME THAT EVEN IF SUCH A MOTION IS BROUGHT, YOU WERE GOING TO DENY IT ANYWAY, AND PREDICATED ON THAT, YOU PROCEEDED -- (interruption by judge)

"THE COURT: I SAID I WAS GOING TO DENY THE MOTION?

"MR. MEKBIB: I BELIEVE YOU STATED THAT.

"THE COURT: I COULDN'T HAVE SAID THAT. IF I DID, THAT'S IMPOSSIBLE.

"MR. MEKBIB: AT LEAST THAT'S WHAT I THINK I HEARD.

"THE COURT: I DON'T REMEMBER SAYING ANYTHING LIKE THAT, MR. MEKBIB. I'M GOING TO DECIDE THE MOTION ON THE MERITS OF IT." [*APX. PAGES 172-3.*]

The strength of the judge's denial of his remark left no option but to proceed to fight the motion on its merits. But the remark, detrimentally relied upon by the Petitioner and as fully supported by the record, leaves no doubt that Scales was not "fully heard" as required by Rule 52(c).

More importantly, however, despite the assurances given and the understanding reached, the court relied *exclusively* and *extensively* on defendant's experts testimonies to enter judgment for the defendant. Every reason articulated in the judgment for the rejection of Scales' statistical and comparative evidence are derived from the testimonies of defendant's witnesses. Indeed, such is the extent of the court's reliance that scholarly articles submitted by defendant's expert witness are directly quoted in the judgment itself. But for such reliance, there would have been no basis for the rejection of Scales' statistical, comparative or her evidence of disparate treatment. [PLEASE SEE PART FOUR, INFRA.]

V. FACTS MATERIAL TO THE CONSTITUTIONAL AND STATUTORY QUESTIONS

On August 17, 1993, Scales filed a timely appeal from the four summary judgments as well as the final judgment rendered against her. Relying on 28 U.S.C. Section 455(a) and

455(b)(1), she moved, by Motion filed 10/12/93, for summary reversal of the five judgments.

Citing United States v. Pollard, 959 F2d 1011 (D.C. Cir.), cert. denied, 113 S. Ct. 322 (1992), the court concluded that "the district judge did not abuse his discretion ... in failing to disqualify himself." [*APX. PAGE 5.*] Petitioner respectfully submits that the court's conclusion belies the letter and spirit of Sec. 455(a) and is in conflict with the rulings and standards of this Court in Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847 (1988).

In her briefs and oral argument, Scales then urged the court below to reverse the summary dismissals of her Section 1981 and common law claims because the dismissals are erroneous, violate the mandates of F.R.Civ.P. Rule 56 and are inconsistent with the standards for summary judgment established by the United States Supreme Court and the circuit itself. She also urged reversal of the bench trial judgment noting her detrimental reliance on the

district judge's remarks and instructions as above recited. She argued that she was not "fully heard" within the purview of Rule 52(c) inasmuch as she was denied opportunity to rebut defendant's witnesses testimonies which became the entire predicate for the judgment.

The court below affirmed all of the five judgments against the Petitioner concluding that "*REGARDLESS OF WHETHER OR NOT*" *the district court correctly dismissed Petitioner's Section 1981 and common law claims, the claims fail because "(a)ppellant did not establish discrimination in her Title VII claim."* Thus, the court below validated all the judgments against Scales by according collateral estoppel effect to the Title VII bench trial judgment [*APX PAGES 1-2.*].

Petitioner respectfully submits that the judgment of the court below violates the Seventh Amendment and is in conflict with the unanimous ruling of this Court in Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (1990).

PART TWO - ARGUMENTS

I. SUMMARY OF ARGUMENTS

A. The judgment of the court below infringes upon Petitioner's Seventh Amendment right to trial by jury and conflicts with the unanimous decision of this Court in Lytle, op. cit. The judgment accords collateral estoppel effect to the bench trial judgment of the district court which resolved first Scales' Title VII equitable claims only because the court erroneously dismissed her Section 1981 and other common law claims.

B. Scales' Section 1981 claims were erroneously dismissed inasmuch as she has established contested issue of material fact as envisioned by Rule 56 and the controlling law on summary judgment.

C. Scales' fraud claim was erroneously dismissed inasmuch as contested issue of material fact is established by the record and the district court has deviated from settled law in its dismissal of the claim.

D. Scales' breach of contract claim was erroneously dismissed inasmuch as the district court failed to address the specific legal theory on which the claim is based and ignored the evidence of the record.

E. Scales' emotional distress claim was erroneously dismissed inasmuch as the claim is timely filed and the court erred-in-law.

II. THE JUDGMENT BELOW SERIOUSLY UNDERMINES PETITIONER'S SEVENTH AMENDMENT CONSTITUTIONAL RIGHTS AND CONFLICTS WITH A UNANIMOUS DECISION OF THE UNITED STATES SUPREME COURT

The Seventh Amendment to the Federal Constitution guarantees a citizen's right to trial by jury in "suites at common law." The Petitioner's entitlement to trial by jury on her common law causes of action [fraud, breach of contract and intentional infliction of emotional distress] is a constitutional mandate.

The Seventh Amendment right to trial by jury also applies to actions brought to enforce statutory rights analogous to common law causes of action; Granfinanciera S.A. v. Nordberg, 492 U.S. 33 (1989). It is settled law that, under 42 U.S.C. Section 1981, victims of racial discrimination are permitted to obtain jury trial at which both equitable and legal relief may be awarded; see, inter alia, Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 1990); Sester v. Novack Investment, Co., 638 F.2d 1137 (8th Cir.); cert. denied. 454 U.S. 1064 (1981); Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980).

From the incipiency of this civil action,

the Petitioner has demanded "JURY TRIAL ON ALL ISSUES TRIABLE BY RIGHT TO A JURY." Thus, it is a constitutional requirement that the Petitioner be afforded jury trial with respect to her Section 1981, breach of contract, fraud and emotional distress claims.

But, the appeals court affirmed the clearly erroneous summary dismissals of Petitioner's causes of action by according a collateral estoppel effect to the bench trial ruling of the district court which dismissed the Title VII claims. The court reasoned:

> "the district court dismissed appellant's claim under 42 U.S.C. Section 1981 because 'there is no indication that a promotion to NUC would create a new and distinct relationship between the employee and the employer ....' *REGARDLESS OF WHETHER THE COURT CORRECTLY SO RULED, THE CLAIM FAILS. APPELLANT DID NOT ESTABLISH DISCRIMINATION IN HER TITLE VII CLAIM. SHE THEREFORE COULD NOT HAVE SUCCEEDED ON HER SECTION 1981 CLAIM. SIMILARLY, APPELLANT WOULD ALSO HAVE HAD TO ESTABLISH DISCRIMINATION TO SUCCEED IN HER COMMON LAW BREACH OF CONTRACT CLAIM. BECAUSE SHE COULD NOT HAVE DONE SO, THE BREACH OF CONTRACT CLAIM WAS ALSO PROPERLY DISMISSED*." [*APX. pp. 1-2*.]

The reasoning and conclusion of the appeals

court is in direct conflict with the decision of this Court in Lytle v. Household Manufacturing, Inc., 494 U.S. 545 (March 20, 1990) ["Lytle"]. The precise issue Scales presented has been addressed by this Court in Lytle a case in which Lytle, an African-American, filed both Title VII equitable and Section 1981 legal claims alleging racial discrimination and retaliation by his employer. The lower court dismissed the Section 1981 claim without a trial and then resolved the Title VII claims against Mr. Lytle at a bench trial. Lytle appealed and the Fourth Circuit affirmed the lower court's rulings noting that the elements of a cause of action under both Title VII and Section 1981 are identical and the appellant is collaterally estopped from pursuing his Section 1981 claims.

By a unanimous decision (with Justice O'Connor concurring), the Supreme Court vacated and remanded. Held:

> *"But for the dismissal of Lytle's Section 1981 claims, he would have been entitled to a jury trial on all issues common to them*

> *and his Title VII equitable claims (citation omitted) ....*" [at page 545]
>
> "*We decline ... to accord collateral estoppel effect to a district court's determinations of issues common to equitable and legal claims where the court resolved the equitable claims first solely because it erroneously dismissed the legal claims. To hold otherwise would seriously undermine a plaintiff's right to a jury trial under the Seventh Amendment.*" [at p. 555, emphasis added].

In light of the clarity of this decision and the mandates of the Seventh Amendment, the court of appeals has erred substantially. *It is not "(r)egardless of whether the (district) court correctly so ruled (i.e. dismissed the Section 1981 claims that) the claim fails." It is precisely on whether or not the district court erroneously dismissed the Section 1981 (and other common law) claims that Petitioner's Seventh Amendment jury trial rights hinge upon*. The appeals court conclusion, inter alia, that "(a)ppellant did not establish discrimination in her Title VII claim. She therefore could not have succeeded on her Section 1981 claim" is the antithesis of the Lytle decision.

Under Lytle and the Seventh Amendment, the proper inquiry is whether or not the district court resolved the Title VII claims first only because it preempted Scales constitutional demand for trial by jury by erroneously dismissing the Section 1981 and common law claims. *If it is shown that the summary dismissals of the Section 1981 and common law claims were in error, then the bench trial findings of the district court on the Title VII claims must not collaterally estop the Petitioner from her entitlement to jury trial on her legal claims*. By reversing these principles, the appeals court has seriously undermined, if not abrogated, Scales' right to trial by jury under the Seventh Amendment.

BUT FOR the district court's erroneous dismissal of Petitioner's Section 1981 and/or breach of contract and/or fraud and/or emotional distress claims, she would have been entitled to jury trial on all issues common to her Title VII, Section 1981 and common law claims

[Lytle/the Seventh Amendment/Rules 38 and 39, F.R.Civ.P.]

The district court's erroneous dismissals of Scales' legal claims are propounded below tangent to the controlling law on summary judgment and the evidence of the record.

III. PETITIONER'S SECTION 1981 AND COMMON LAW CLAIMS OF BREACH OF CONTRACT, FRAUD AND EMOTIONAL DISTRESS WERE ERRONEOUSLY DISMISSED

A. STANDARD OF REVIEW

The standard of review for summary judgment, which should have controlled the disposition of Scales' appeal and preservation of her Seventh Amendment right, is as follows.

Grant of summary judgment is reviewed de novo; see, e.g., Shields v. Eli Lilly & Co., 895 F.2d 1463 (D.C. Cir. 1990) ["Shields"]; Nikoi v. Attorney General, 939 F.2d 1065, 1068 (D.C. Cir. 1991); Liberty Lobby, Inc. v. Rees, 852 F.2d 595, 598 (D.C. Cir. 1988), cert. denied, 489 U.S. 1010 (1989).

The predicate for summary judgment is the absence of "genuine issue as to any material

fact and that the moving party is entitled to judgment as a matter of law" Rule 56, F.R.Civ.P. In 1986, the U.S. Supreme Court rendered a trilogy of decisions enunciating the standards governing summary judgment proceedings, viz: Matsushita Electric Industrial Co., Ltd. et. al. v. Zenith Radio Corp., et. al., 475 U.S. 574 (1986) ["Matsushita"]; Anderson, et. al. v. Liberty Lobby, Inc. et al., 477 U.S. 242 (1986) ["Anderson"]; and Celotex Corp. v. Catrett, 477 U.S. 317 (1986) ["Celotex"].

The standard test for summary judgment is "whether a fair-minded jury could return a verdict for the [nonmovant] on the evidence presented." Anderson, p.251. The burden of the nonmovant is to be able "to make a showing sufficient to establish the existence of an essential element to the party's case, and on which that party will bear the burden of proof at trial." Celotex, p.322; Shields, p.1465.

In evaluating the nonmoving party's burden, the trial judge is to consider the cumulative

effect of the evidence; see Catrett v. Jones-Manville Sales Corp. v. FTC, 826 F.2d 33, 39-40 (D.C. Cir. 1980) and "grant all reasonable inferences to the nonmoving party." Exxon Corp. v. FTC, 663 F.2d 120, 126 (D.C. Cir. 1980). See also Anderson, p.255.

The trial court is to grant summary judgment "only if there is no 'significantly probative' evidence tending to support the complaint" Anderson, pp.249-50.

Furthermore, the Supreme Court has defined and delineated the roles of judge and jury in summary judgment proceedings. Thus, it is held:

> "Our holding ... on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial by affidavits. *Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences are jury functions, not those of the judge .... The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor* .... Neither do we suggest that the trial courts should act other than with caution in granting summary judgment ...." Anderson, p. 255.

As to the application of summary rulings in employment discrimination cases, held:

> "*Summary judgment should seldom be used in cases alleging employment discrimination* because of the special category in which Congress and the Supreme Court visualized these cases." Hillebrand v. M-Tron Industries, 827 F.2d 363, 363 (8th Cir. 1987).

As argued below, the summary dismissals of Scales causes of action violate the tenets and standards herein proffered and unduly infringe upon her rights to trial by jury.

B. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER SECTION 1981 CLAIMS

In Count III, Petitioner alleges that the Hospital denied her promotion from her ANC to NUC position in December 1986 and March 1987 because of her race. In Count IV, she alleges that she was the victim of retaliation.

In December 1989, the U.S. Supreme Court rendered the Patterson v. McLean Credit Union, 491 U.S. 165, decision redefining the scope and reach of Section 1981. The University moved for summary judgment to dismiss Scales' Section 1981 claims maintaining that her promotion from ANC

to NUC is not cognizable under the statute since the promotion would not have created "a new and distinct relationship" between her and the employer as required by Patterson.

Thus, the seminal issue of material fact before the court was:

> "*Whether or not Scales' promotion from her ANC to NUC position would have created a new and distinct relationship between her and the employer as required by Patterson*."

To sustain its position, the University submitted an affidavit by its Director of Nursing, McCarthy, who described the two positions as virtually interchangeable. However, McCarthy's testimony was a complete reversal of testimony she proffered in her responses to Scales' interrogatories.

Opposing the motion and guided by Anderson, Scales set forth specific facts showing the existence of genuine issue for trial. First, she secured the *testimony of her expert witness, Dr. John Work* (Black), who, upon thorough analysis of the ANC and NUC positions at issue,

provided an extensive affidavit. His precise conclusion read:

> "*CONCLUSIONS:* *On the basis of the foregoing analysis, we conclude that, had Ms. Scales been successful in her bid to become a NUC from her ANC position, she would have formed a new, clear, distinct, substantial and fundamentally different relationship with her employer. She would have been the subject of a significant promotion. We firmly reject the view that the NUC and ANC positions are similar in scope, levels, or nature of duties and responsibilities. They simply are not."* [*APX. pp.190-191.*].

Thus, as required by Rule 56, Petitioner unequivocally demonstrated the existence of a genuine issue of material fact foreclosing the University's motion for judgment. Moreover, guided by Anderson, Scales also moved the court to deny the motion because McCarthy's affidavit raises substantial "credibility questions" since it conflicted with McCarthy's testimony in response to Scales' interrogatories. She informed the court that those credibility questions are for a jury to determine per the directives of Anderson.

However, the district court summarily

dismissed the Section 1981 claims citing Patterson and concluding: "*(t)here is no indication that a promotion to NUC would create 'a new and distinct relations between the employee and the employer ....'*" [*APX. PAGE 21*.] It dismissed Petitioner's Section 1981 retaliation claim because the underlying race bias claim (Count III) was dismissed.

Not a word was mentioned regarding the expert testimony of Dr. Work proffered at great expense and sacrifice. And while the court relied on the affidavits of McCarthy, it did not address the "credibility issues" Scales raised on the basis of the record. It is in disregard of Scales' evidence and Anderson's directive - "*the evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor ...*" - that summary judgment was granted.

There can be no question that, within the precise dictum of Rule 56 and the controlling standards for review of summary judgment

(supra), Scales has established a "genuine issue of material fact" tangent to the seminal issue of whether or not her promotion from ANC to NUC position "would have created a new and distinct relationship between her and the employer."

The University was not entitled to summary judgment. Scales' Section 1981 claims were erroneously dismissed. But, instead of rectifying the erroneous dismissal, the appeals court compounded the error by validating the dismissal contrary to the tenets of Lytle and the rights granted to the Petitioner under the Seventh Amendment.

C. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER BREACH OF CONTRACT COMMON LAW CLAIM

The Claim: Scales claims that she is an intended third-party beneficiary of an anti-bias contract between the Hospital and the Federal Government. By subjecting her to systemic racial discrimination, the University breached her rights under the contract.

Procedural History: The court initially dismissed this claim declining to exercise pendent jurisdiction [*APX. p. 22*.] Under the mandates of diversity jurisdiction, the court re-examined and reaffirmed the dismissal. Held, Scales "was an at-will employee" not subject to contractual protection [*APX. pp. 33-38*.]

Arguments: The dismissal of Count VI was clearly in error. The court completely failed to address the legal theory on which Scales' breach of contract claim has been predicated. Both in her brief and oral argument, Scales has sustained the following legal theory:

On January 21, 1977, the Hospital entered into a contract with the U.S. Department of Health, Education and Welfare in which it represented and assured, inter alia:

> *"[N]o person in the United States shall, on the ground of race ... be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program or activity for which the [Hospital] receives Federal financial assistance from the Department."* [*APX. p.309.*]

In consideration for its contractual assurances and representations, the Hospital became and has been a recipient of Federal grants, loans, Medicare/Medicaid payments and other financial emoluments.

Petitioner is one of the intended beneficiaries of this contract. *She is a third-party beneficiary of the contract.* The federal courts have recognized the third-party beneficiary status of protected individuals (such as Petitioner) under contracts with government entities; see, inter alia, Miree v. DeKalb County, 433 U.S. 25 (1977); Amalgamated Transit Union, Local 714 v. Greater Portland Transit District, 589 F.2d 1, 14 (1st Cir. 1978) [dictum: "... employees (are protected) whether covered by a protection as donee or intended beneficiaries of the assistance contract between the Secretary of Transportation and their employer"]; U.S. ex rel. Johnson v. Morely Construction Co., 98 F.2d 781, 788-89 (2nd Cir. 1938) [held: workers have standing to sue as

third-party beneficiaries to contract between employer and government); N.A.A.C.P. v. Wilmington Medical Center, Inc. 599 F.2d 1247 (3rd Cir. 1979); Manuel v. International vester Co., 520 F.Supp. 45 (N.D. Ill. 1980).

Likewise, District of Columbia law recognizes the contractual standing of third-party beneficiaries under contracts intended for their benefits (see Sheriff v. Medel Electric. Co., 412 A.2d 38 (D.C.App. 1980); District of Columbia v. Campbell, 580 A.2d 1295 (D.C.App. 1980); Western Union Tel Co. v. Massman Const. Co., 402 A.2d 1275 (D.C.App. 1979).

By subjecting her to systemic racial bias, the Hospital breached the contractual protection Scales is afforded as third-party beneficiary.

In granting summary judgment to the University, the court did not address this legal claim nor rule upon the factual evidence Petitioner has proffered. Instead, it chose to discuss the general theories of at-will employment which do not touch upon the premise

of Petitioner's claim.

The breach of contract claim is a "suit at common law" which entitles the Petitioner to trial by jury as she has demanded all along. However, the appeals court affirmed the dismissal by according collateral estoppel effect to the Title VII ruling of the district court. The only reason why the district court first resolved the Title VII claim is because of its erroneous dismissal of the breach of contract claim. In such order, the Petitioner has been deprived of her Seventh Amendment guarantees as the Amendment is construed and preserved by the Lytle decision.

D. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER COMMON LAW FRAUD CLAIM

The Claim: Simply put, the fraud count asserts that the Hospital falsely represented itself as an EEO/AA employer verbally and in writing when it was not. Scales detrimentally relied upon on the misrepresentations resulting

in her loss of career opportunities and causing her to apply for promotion to the NUC position which she was denied twice.

Procedural History: The University moved for summary judgment. The district court granted the motion declining to exercise pendent jurisdiction [*APX. PAGE 22*.] Scales filed for reconsideration, reminding the court that the claims were properly asserted under the mandates of diversity jurisdiction. By Order filed 11/18/91, the court reaffirmed its dismissals but reinstated the fraud count ruling:

> "*On re-examination of the pleadings and other filings in this case, it appears defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law. Accordingly, defendant's motion for summary judgment on count VII is denied without prejudice*." However, in the same Order, the court invited the defendant to file a supplemental motion to re-dismiss the count just reinstated. [*APX. PAGE 39*].

The University filed a supplemental motion. By Order filed 08/21/92, the court re-dismissed the fraud count. Held, Scales did not rely on the Hospital's representations that it is an EEO

employer because, in her deposition testimony, she admits that her supervisor, Hamilton, Black, had apprised her "*to do or work twice as hard in order to better herself in whatever profession she took*." [*APX. PAGE 52*]. Rejecting Scales' second motion for reconsideration, the court affirmed its dismissal of the count. It held that Scales failed to demonstrate disputed facts as to the third and fourth elements of the tort as required by Celotex, supra [*APX. pp. 67-8.*]

Arguments: At the outset, the assertion that Scales' fraud claim does not demonstrate disputed facts as to each element of the tort is contradicted by the record. In her opposition motions, she has shown and substantiated the contested genuine issues of material facts as they relate to each element of the tort. Not less significant is the court's own conclusion that "on re-examination of the pleadings and other filings in this case, it appears defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law." [*APX.*

PAGE 39.] This conclusion belies the court's subsequent ruling that disputed facts are not shown per Celotex to preempt summary dismissal.

Moreover, the court misconstrued Celotex by suggesting that the decision requires "disputed facts" to be established with respect to each element of the cause of action. [*APX. p. 68.*] Celotex does not impose any such requirement. By its own text, Celotex directs that a nonmovant must be able "to make a showing sufficient to *establish the existence of an element essential* to the party's case, and on which the party will bear the burden of proof at trial." Celotex, p.322.

Indeed, Celotex could not possibly mandate proof of disputed issues of material fact with respect to each element of any cause of action. For instance, a common law claim for fraud (as in this case) has five elements [see Bennett v. Kiggins, 377 A.2d 57, 59 (D.C. 1977). According to the district court, a nonmovant would have to establish a contested issue of material fact

with respect to each of those five elements. If there are no disputed facts with respect to three or four of those elements but a contested issue of material fact is established with respect to one or two of those elements, the court will grant summary judgment despite the contested issue(s) of material fact(s) sustained by significantly probative evidence. While Celotex never suggested such an outcome, the court's reasoning abrogates the specific language of F.R.Civ. P. Rule 56(c) which predicates summary judgment on the absence of "genuine issue as to *any* material fact." Thus, the ruling against Scales is wrong as a matter of law considering the legal premise upon which the court examined the summary judgment motion.

Nevertheless, the core reason for the summary dismissal of the fraud claim how the court *interpreted* and *construed and inferred from* the deposition testimony of Scales as to conversations she had with Edna Hamilton, her Black mentor and supervisor at the Hospital

between 1974 and 1984:

> "Over the course of my employment with Edna, I had discussions and she would always ... tell me about the problems she was having because she was Black and how ... I as a Black staff nurse, or whatever, would have to do or work twice as hard in order to better myself or to do better in whatever job or profession that I took ....
>
> "She (Hamilton) discussed the problem that because I am Black, I would have to work harder, if I wanted a promotion, I would have to do better on the unit, I would have to exceed in my evaluation, I would have to excel in my performance in order to get promotions, or what have you .... She told me that I would have to perform better than my white counterparts in order to better myself, in order to get the promotion."

At the behest of the University, the court *interpreted* and *inferred* from this testimony the remarkable conclusion:

> *"regardless of what plaintiff may have believed regarding defendant's assertions that it is an equal opportunity employer when she was hired in 1966, at some time between 1974 and 1984, and certainly not later than July of 1984, plaintiff was not acting or forebearing in reliance on such assertions."* [*APX. PAGES 53-54.*]

In a Motion for Reconsideration filed 09/30/92, Scales submitted that the court has misconstrued her testimony. To wit:

1. By affidavit filed 09/30/92, Scales

explained the socio-cultural context in which she communicated with Hamilton. She testified:

> "... I did trust and believed my employer completely. I believed in their claim that the [Hospital] is an [EO] employer ... and [AA] employer. I believed my employer would not discriminate against me because of my race since I was loyal to them ...
>
> "When Mrs. Hamilton ... was telling me that I 'as a black staff nurse ... would have to do or work twice as hard in order to better myself or to do better in whatever profession I took' I did not think or believe that she was telling me that my employer was discriminating against .... When Mrs. Hamilton was telling me that 'I would have to work harder if I wanted a promotion, I would have to do better on the unit, I would have to exceed in my evaluations, [or] I would have to excel in my performance in order to get promotions' I did not think or believe that I was being discriminated against because of my race .... At no point has Mrs. Hamilton told me that I or her are the subject or racial discrimination by the [Hospital] ....
>
> "*[Her advise] was not any different from the advice that my father and mother had given me - 'you need to work twice as hard as white folks if you want to get ahead.' .... All around me, Black people have been saying the same things .... [Her advise to me is] part of my cultural heritage as an African American .....*"

2. In support of her submission, Scales also proffered the affidavit [filed 09/30/92] of

her 70 year old mother, Regina Quick:

> "With a family of eight children, it was important that we learned how to deal with racism and discrimination ....
>
> "... we taught our children to trust and honor God. We taught them to work hard and to work harder .... We taught them to persevere .... We taught them to be honest, to have integrity, to do the best job they can. *We taught them to work twice as hard as white people so they get noticed*.... we taught them that their future depended on education ....
>
> "... *I do not think that Mrs. Hamilton was telling my daughter that she was being discriminated against because of her race when she advised her to work twice as hard as her white colleagues. I told Deborah [Petitioner] to work twice as hard as white people even before she became an employee of the [Hospital]. I have told all my children to work twice as hard as white people if they wanted to get ahead.... I am not aware of any Black family of my generation that did not advise young Blacks to work twice as hard and to compete twice as hard as whites. [This] is part of our African-American culture* ...."

3. In furtherance of the validity and reality of her submissions, Petitioner proffered the court below an article by Dr. Lonnie Bunch, Black, Culture Historian and Curator with the Smithsonian Institution. The author notes:

> "... I had to prove my worth ... Having to

prove my worth is not knew to me or for most black Americans .... *[F]or both guidance and motivation, I simply relied on an adage that African-American parents have taught their children for generations: in America, blacks 'have to work twice as hard to get half as far.*" Lonnie G. Bunch, Ph.D., Exhibiting American Culture in Japan, MUSEUM NEWS, 4/94, p. 32; 35 col. 1.

4. Petitioner also offered the district court the *testimonies of two of her expert witnesses. Dr. Lennox Joseph*, Black, a leading Behavioral Scientist, testified:

> "Prior to her denial (of promotion), Mrs. Scales was in a very insulated environment .... She was not aware of the consequences of the differentiation of behavior by individuals to her because of her race .... *What happened with the denial was that for the first time she called into question all the behaviors and values espoused and in use by the system (at the University) and began to reevaluate it with a certain insight that she didn't have prior to that time*." DEPOSITION OF DR. LENNOX E. JOSEPH, MAY 7, 1990, pp.72-73

Yet another expert witness, *Dr. Andrew Molchon, M.D., Psychiatrist*, testified as to Scales' total trust and faith in her employer:

> "*Had she [Scales] not been a long term employee and had she not been an employee who developed expectations of loyalty running both ways between her and her employer, then she would have, in my*

opinion at least, less likely have viewed this [her rejections for the NUC position] as a humiliating, devastating event in her life." DEPOSITION OF DR. ANDREW MOLCHON, MAY 1, 1990, at p.36.

In total disregard of this record, the court ruled "*it is clear that at least some of the statements in plaintiff's deposition do reveal her awareness of discrimination at the University (and, in fact affecting her). To the extent that plaintiff now attempts to contradict that conclusion in her newly filed affidavits, such an effort to create a genuine issue of fact must fail.*" [APX. pp. 66-67.]

The ruling is not only erroneous but tragic. Scales' affidavit did not retract one word from her deposition testimony nor attempt to modify the contents thereof. What she has and continues to question is the *illegitimate misinterpretation* of her testimony and the arbitrary *inferences* drawn from her testimony as to her state of mind, her beliefs and values.

By disregarding Petitioner's evidence, the court reached the incredible conclusion that

there is no genuine issue of material fact. In such order, it deviated from the basic tenets of Rule 56. *It was not for the judge to interpret Petitioner's testimony, to construe or misconstrue her communications with her African-American supervisor, or draw inferences therefrom, or adjudge the socio-cultural setting within which the Petitioner communicated with her mentor*. As directed by *Anderson*, these are *jury functions*.

The court also engaged in credibility determinations involving what Scales' state of mind was, what she knew or did not know, what she believed or did not believe .... Yet, *Anderson* instructs: "*credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences are jury functions, not those of the judge* ... " [at page 255.] And where *Anderson* directs that "*the evidence of the nonmovant is to be believed*," the court disregarded Scales' evidence *in toto* and engaged in arbitrary inferences and the misreading of

Petitioner's state-of-mind. In so doing, it also traversed the dictum that it is for the jury to determine when plaintiff discovered or should have discovered the alleged act of fraud; see Kropinski v. World Plan Executive Council, 853 F.2d 948 (D.C. Cir. 1988).

It is tragic that a federal court in charge of the enforcement of our constitutional and civil liberties would so disregard the culture and values of a whole segment of our society:

> "*the proposition [that Petitioner was always taught to work twice as hard as whites in order to advance equally] implies a belief that discrimination is ubiquitous in our society, and such a belief tend to undermine an assertion of reliance on any institution's representation that it is an equal opportunity employer*." [*APX. p. 68.*]

Through this process in which African-American culture has been the subject of judicial broad-brush, there was not even a black clerk in the judicial setting to speak up on behalf of Scales. The Seventh Amendment is intended to avert such a disconcerting prospect.

It is unequivocal that Petitioner has

established a contested issue of material fact. The summary dismissal of this common law claim is in breach of Rule 56, the tenets of Anderson and the standard of review propounded above. The appeals court affirmance of the dismissal conflicts with Lytle and seriously undermines Petitioner's constitutional protection.

E. THE DISTRICT COURT FIRST RESOLVED PETITIONER'S TITLE VII CLAIMS ONLY BECAUSE IT ERRONEOUSLY DISMISSED HER COMMON LAW CLAIM OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Claim: Petitioner claims that the fraudulent conduct and/or intentional racial discrimination the University subjected her to constitute the tort of emotional distress.

Procedural History: The court initially dismissed the count declining to exercise pendent jurisdiction [*APX. PAGE 22*.] When Petitioner demonstrated that the claim was properly before the court under the mandates of diversity jurisdiction, the court affirmed its dismissal concluding that the "claim is time barred." [*APX. PAGES 40-43*.]

Arguments: The dismissal of the emotional distress claim is wrong as a matter of law. It reflects a misreading of the claim itself and a misreading of the statute of limitation.

In *Saunders v. Nemati*, 580 A.2d 660 (D.C. App. 1990) [*"Nemati"*], the Appellate Court held that the tort of intentional infliction of emotional distress has "*independent existence ... in the District ... and in American Jurisprudence generally.*" [At p.661].

When the tort is asserted as an "independent action ..., not intertwined with any of the causes of action for which a period of limitation is specifically provided by D.C. Code Section 12-301, [the applicable statute is] the general residuary three year limitation of [D.C. Code] Section 12-301(8)." Nemati, p.665. When the tort is "intertwined" with any of the causes of action for which a period of limitation is provided by D.C. Code Section 12-301, then the limitation governing the cause(s) of action with which the tort is intertwined

applies; Nemati, pp.665-7.

Under Nemati, there is no basis to suggest that Petitioner's emotional distress claim is time barred. If, as it should [per the text of the Complaint], her claim is construed as an independent action, then it is governed by the "general residuary three year limitation of D.C. Code Section 12-301(8)." Inasmuch as the court recognizes that the claim was filed "*sixteen months*" from the last unlawful act complained of [*APX. pp. 43-44*], it is timely filed.

Even if the claim was not asserted as an independent tort, it is "*intertwined*" with several causes of action for which a three year statute of limitation is provided. To wit:

Petitioner specifically asserts that she was caused extreme emotional distress by "*the fraudulent conduct*" of the Hospital [Complaint, pp. 60-61]. Thus, her emotional distress and fraud counts are "intertwined" by the precise content of the Complaint.

Now, it is extremely important to note here

that by the same Order filed 11/18/91 [APX. pp. 43-44] in which the court dismissed Petitioner's emotional distress claim [count IX] as "time barred," it also concluded that "defendant has failed to establish that plaintiff's fraud claim is deficient as a matter of law" and reinstated the fraud count [APX. pp. 39 & 46].

The statute of limitation for a cause of action sounding in fraud is three years per D.C. Code Section 12-301(8) [see, inter alia, King v. Kitchen Magic, 391 A.2d 1184 (1978)]. *Since Scales' emotional distress [count IX] and fraud [count VII] claims are "intertwined" within the precise dictums of Nemati, the statute of limitation controlling her emotional distress claim is three years.* The ruling that Scales' count IX is time barred is clearly erroneous. Furthermore, dismissal based on statute of limitation presents a question of law to be reviewed de novo on appeal; see Donoghue v. County of Orange, 848 F.2d 926 (9th Cir. 1987).

The emotional distress claim is not time

barred either as a matter of law or fact. The district court first resolved Petitioner's Title VII claim only because it erroneously dismissed her intentional infliction of emotional distress claim. Scales is constitutionally entitled to trial by jury on her cause of action.

PART THREE

THE COURT BELOW HAS SANCTIONED VIOLATION OF 28 U.S.C. SEC. 455(a) cum LILJEBERG v. HEALTH SERVICES ACQUISITION CORP., 486 U.S. 847 (1988) BY THE DISTRICT JUDGE

I. SUMMARY OF ARGUMENTS

The district judge's impartiality might be reasonably questioned under Sec. 455(a) in light of the Hospital-patient, doctor-patient relationship he maintained with the defendant during the pendency of the case. The court below sanctioned the judge's violation of the statute and the Liljeberg ruling by concluding that the judge did not abuse his discretion.

II. ARGUMENTS

28 U.S.C. Sec. 455(a) mandates that "(a)ny ... judge ... of the United States shall disqualify himself in any proceeding in which his impartiality might be reasonably questioned." It is held that:

> *"violation of Sec. 455(a) ... is established when a reasonable person, knowing the relevant facts, would expect that a judge knew of circumstances creating an appearance of partiality, notwithstanding a finding that the judge was not actually conscious of those circumstances."* Liljeberg v. Health Services Acquisition Corp., *108 S.Ct. 2194, 2196 (1988).*

In enacting Sec. 455, Congress intended to adopt "objective," "reasonable factual basis-reasonable man" standard, *as opposed to the judge's "own opinion of his impartiality."* Recusal is required where "*average person on street might be inclined to harbor doubts about judge's impartiality*": see, inter alia, Fong v. American Airlines, Inc. 431 F.Supp. 1334 (ND Cal. 1977); Davis v. Board of School Comrs. 517 F2d 1044 (CA5 Ala., 1975); rehearing denied, 521 F2d 814, cert. denied 425 U.S. 944; United States v. Ritter, 540 F2d 459 (CA 10, 1976); cert. denied 429 U.S. 951; United States v. Conforte, 624 F2d 869 (CA9 Nev. 1980); cert. denied 449 U.S. 1012; Re. Teltronics Services, Inc. 39 BR 446 (BC ED NY, 1984); Re Olson, 20 BR

206 (DC Neb. 1982).

The purpose of Sec. 455 is "to promote public confidence in the integrity of the judicial process {and} does not depend upon whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." Liljeberg, supra, at page 2203. Indeed, Sec. 455 requires judges to avoid even the appearance of partiality. Held:

> "*The goal of Sec. 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible.*" *Hall v. Small Business Administration, 695 F2d 175, 179 (5th Cir. 1983).*

It is the judge who has the duty to monitor his own extra-judicial actions and conduct. He "must know" his interest and of the disqualifying facts which risk that his impartiality might reasonably be questioned.

Section 455 is construed to be "self enforcing" and envisions sua sponte disqualification of judge where impartiality might be reasonably questioned. Potashnick v. Port City Constr. Co., 609 F2d 1101 (CA5, Ala. 1980); cert. denied, 449 US 820; Liljeberg, supra, 2202; Idaho v. Freeman, 507 F. Supp. 706 (DC Idaho, 1981); et. al.

The issue in the case at bar is whether or not the judge was required to disqualify himself pursuant to Sec. 455(a) because his impartiality might reasonably be questioned in view of his patient-Hospital relationship with the defendant?

There can be no question that "any average person on the street," would reasonably question the judge's impartiality in view of the relationship he formed and maintained with defendant's Hospital for over a period of three years during the pendency of the case. *Indeed, the judge himself has recognized that patient-Hospital, patient-doctor relationship with the*

defendant was an objective and reasonable disqualifying factor. Based on this precise objective and reasonable disqualifying factor, several prospective jurors (including those who spent five to six hours at defendant's Emergency Room) were disqualified by the judge from serving on the advisory jury panel [please see *APX. pp. 145-166*.]

His own specific directive was: *"WE WILL HAVE TO ELIMINATE PEOPLE (PROSPECTIVE JURORS) WHO HAVE BEEN PATIENTS THERE (AT THE GEORGE WASHINGTON UNIVERSITY HOSPITAL)."* Please see *APX. p. 149.* Predicated on his own assessment that the fairness and impartiality of jurors might reasonably be questioned because of their or their family members patient-Hospital relationships with the defendant, he disqualified JURORS # 3275, 2737, 4010, among others. [*APX. p. 145 et. seq.*]

He extended the reach of his directive to include jurors who visited the Hospital as out-patients on an emergency basis. Thus, he

disqualified JUROR 4045, who was treated at the Emergency Room of defendant's Hospital for five to six hours [*APX. pp. 147-148.*] He recognized the reasonable probability that a patient (whether inpatient or outpatient) would have opportunity to observe and form opinions as to the employer-employee relationships and "employment practices" which exist at the defendant's Hospital. On this basis too, he questioned the fairness and impartiality of prospective jurors and ruled to disqualify them. [*APX. p. 145 et. seq.*]

Thus, of a prospective juror whose son had surgery at the defendant's Hospital, the judge asked: "Did you have an opportunity to observe the employment practices there (at the Hospital)?" [*APX. page 147.*] Of yet another juror who visited the Hospital for a routine test, he asked: "Anything about that experience that gave you an occasion to observe the relationship between people who work there in the Hospital?" [*APX. page 151.*] Of Juror #

4045, he asked: "Did you have an opportunity there to observe in that time (the five to six hours the juror was at defendant's Emergency Room) the working arrangements?" [*APX. p. 147.*]

By his own questions, by his own judgment, by his own directives, the judge has concluded that a patient-Hospital relationship with the defendant serves as a basis to question one's fairness and impartiality. The relationship between doctors and patients is one to which our legal regime imputes unique significance to the point of carving out and recognizing "the doctor-patient privilege" - a privilege cognizant of the unique, trusting and personal nature of the relationship.

The nurses and nursing administrators who testified by affidavit or at trial before the judge were the nurses who cared for him or planned his primary, cardiac, CCU, PCCU care. The doctors who were scheduled to testify before him were those with whom he shares a unique and privileged relationship. In defiance of Rule

455(a), he chose to adjudicate their employment practices, acts and omissions against the claims and challenges of the Petitioner.

Whatever may be the "objective" "reasonable man" standard, the relationship the judge had formed and maintained with the defendant during the pendency of this case before him must lead to the conclusion that the "judge knew of circumstances creating an appearance of partiality" whether or not he was "pure in heart and incorruptible."

It is a gargantuan abuse of sound judicial discretion for the judge to refuse to recuse himself for the same underlying reason (Hospital-patient relationship) that he found reasonable and objective enough to question the impartiality of prospective jurors and disqualify them for less reason than he had to disqualify himself. *The Congressional mandates of Section 455 are directed to the judge who is expected to obey them and employ them with utmost good faith. The judge clearly abused his*

power by creating a double standard under which he exempted himself from recusal while disqualifying Petitioner's peers - those reasonable citizens on whom we rely as jurors - for the same or lesser reason than he had to recuse himself.

The court of appeals chose to overlook the judge's deviations from the letter and spirit of Section 455(a) and the mandates of this Court in Liljeberg. Instead, it validated his conduct citing its decision in United States v. Pollard, 959 F.2d 1011 (D.C. Cir.) - a decision detached from Section 455(a) and exclusively focused on Section 455(b)(1). In such order, the court below sanctioned a clear and unequivocal violation of the Congressional mandate under Section 455(a) by the district judge.

PART FOUR

THE RULE 52(c) JUDGMENT RENDERED AGAINST THE PETITIONER IS PROCEDURALLY DEFICIENT BECAUSE PETITIONER WAS NOT HEARD "IN FULL"

After the erroneous summary dismissals of Petitioner's legal claims, a portion of Scales'

Title VII claims were bench tried.

During her case-in-chief, the court received the testimonies of defendant's expert witnesses to accommodate their conflicting schedules and facilitate the trial. But, Petitioner's opportunity to be "heard in full" was irreparably compromised as set forth below:

A. In deciding to allow defendant's experts to testify out of turn, the judge made an unsolicited remark (cited above at page 12) indicating:

> "THE COURT: *I PROBABLY WOULDN'T GRANT THAT [defendant's Rule 52(c)] MOTION ANYWAY .... SO LET'S TAKE THOSE WITNESSES OUT OF TURN*." [*APX. p. 170.*]

Relying on this remark, Petitioner restructured and reordered the presentation of her testimonial and documentary evidence during her case-in-chief. She withheld key witnesses and postponed the introduction of critical documentary evidence to rebut defendant's case-in-chief and discredit defendant's witnesses.

But this was not to be. Notwithstanding

the Petitioner's detrimental reliance on his remark, the judge vehemently denied ever making such a statement [*APX. page 172 contradicted by the record at page 170.*] He concluded that he will decide defendant's Rule 52(c) motion "on the merits of it." [*APX. p. 172*.]

On this basis alone, it cannot be said that Petitioner "has been fully heard" as envisioned by Rule 52(c) to be subjected to a judgment on partial findings. As the record unequivocally demonstrates, the judge did make the remark despite his denials. Scales detrimentally relied on the remark - as she must and should - preempting her rights and opportunities to introduce the evidence at her disposal. With witnesses waiting to be heard and documents pending proffer, it cannot be said Rule 52(c) was complied with in the rendering of the July 27, 1993 judgment.

B. *Equally significant was the clear understanding that the testimonies of defendant's witnesses will be excluded from*

consideration in any motion the defendant might initiate at the close of Scales's case-in-chief.

In affirmance of this directives of the court, the defendant's counsel himself prefaced the Rule 52(c) motion as follows:

> "MR. FRAZIER: LET ME JUST PREFACE MY REMARKS. *IN THE COURSE OF THE PROCEEDINGS UP UNTIL NOW WE DID HAVE TESTIMONY OF SEVERAL DEFENSE WITNESSES. YOUR HONOR HAS INDICATED THAT FOR THESE PURPOSES HERE WE ARE NOT GOING TO CONSIDER THAT TESTIMONY AND I'M NOT GOING TO ARGUE BASED UPON WHAT DR. SEBERHAGEN OR MS. CARL HAD TO SAY REGARDING WHAT THEY DID OR REGARDING WHAT MS. McCARTHY HAD TO SAY ... ON MY DIRECT."* *(APX. page 174).*

Despite its own directives and the parties' understanding, the court rendered the judgment below extensively relying upon the defendant's expert witnesses. Indeed, there is no shred of evidence to sustain the court's rejection of Scales' critical statistical and comparative evidence but for its unfettered reliance on the defendant's testimonies. To wit, inter alia:

1. In rejecting Scales' statistical evidence [*APX pp. 95 et. seq.*] and dismissing her claim, the court opined that Dr. Work

(Scales' expert) "merged data for the period 1981 through 1989" and for this reason the data has diminished probative value [*APX. p. 95.*]

The reasoning that Dr. Work "merged data" is an argument extensively propounded by Dr. Seberhagen [defendant's expert witness] who testified during Petitioner's case-in-chief. [Please see *APX. pp. 209-210; 242-245; 254-258.*]

2. The court's reasoning that "the sample size used in Dr. Work's analysis is too small ..." [*APX. pp. 112-3*] is the precise argument enunciated by defendant's expert. Please see *APX. pp. 215-217; 229-220; 246-250.*

3. Each of the five arguments the court listed for rejecting Dr. Work's analysis on Nursing Unit Coordinator educational qualifications [*APX. pp. 112-3*] were derived, almost verbatim, from the testimony of the defense expert. *APX. pp. 214 et. seq. 229-242.*

4. Even the so-called "scholarly publications" the court took judicial notice of [*APX. p. 113 footnote 18*] are the precise

publications which the judge asked for and were proffered by Dr. Seberhagen, defendant's expert. Please see *APX. pp. 248; 250.*

It cannot be said that the Petitioner was "heard in full" within the purview of Rule 52(c) when her detrimental reliance on the judge's remarks and directives have denied her the opportunity to rebut the defendant's evidence. After all, according to the Notes of Advisory Committee on Rules, Rule 52(c) is a progeny of the former Rule 41(b). The impropriety of a judge's reliance on defendant's witness testimony to decide on a Rule 41(b) motion is clearly recognized.

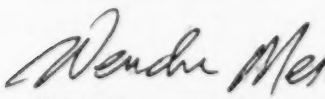
Thus, it is held that a Rule 41(b) judgment is improper "*if the judge weighed the testimony of defendant's ... witnesses as well as plaintiff's evidence*" Sanders v. General Services Administration, 707 F.2d 969, 972 (7th Cir. 1983). Those recognized principles of fairness and propriety must also guide the interpretation and application of Rule 52(c).

Against this background, the affirmance of the district court's judgment by the circuit court engenders a profound miscarriage of justice.

CONCLUSION

For the above reasons, certiorari should be granted to review the judgment and order below, summarily reverse the judgment and order of the D.C. Circuit, mandate the disqualification of the district judge and remand the case [the Section 1981, breach of contract, fraud, emotional distress and Title VII claims] for jury trial and adjudication by a district judge whose impartiality might not be reasonably questioned.

RESPECTFULLY SUBMITTED,



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CERTIFICATE OF SERVICE

I certify that a complete copy of the foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit" and its accompanying Appendix was mailed, by first class mail, postage prepaid, on this 12th day of April, 1995, to Thomas D. Quinn, Jr., Esquire, REASONER, DAVIS & FOX, 888 Seventeenth Street, N.W., Suite 800, Washington, D.C. 20006-3994; attorneys for the Respondent, the George Washington University.

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